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No. 04-1071

Supreme Court, U.S.
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In The
Supreme Court of the United States

WALKER INTERNATIONAL HOLDINGS LIMITED,

Petitioner,

v.

THE REPUBLIC OF CONGO, CAISSE CONGOLAISE D'AMORTISSEMENT, and MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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INTRODUCTION

The opposition to the petition for writ of certiorari in this case is as telling for what it does not address as for what it does. Murphy does not dispute that the Fifth Circuit's interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") has broad and significant implications, both economic and jurisprudential. Nor does Murphy dispute that the Fifth Circuit's interpretation is at odds with the plain meaning of the FSIA. Similarly, Murphy ignores most of the absurd results flowing from the Fifth Circuit's ruling. It does not dispute that under the Fifth Circuit's interpretation, a foreign state's central bank accounts would be entitled to less protection under the FSIA than ordinary commercial property. Murphy also does not dispute that the Fifth Circuit's interpretation fails to reconcile the New York Convention and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208 ("FAA") with the FSIA. Murphy asserts that as a stakeholder, garnishee, it has a "duty" to stand in the shoes of the Congo and raise all "known defenses" of the Congo, but ignores that the Congo waived any defense of sovereign immunity.

Instead of addressing the questions presented in the petition, Murphy recasts them to ones it can answer.[1] Although the Petition asks whether a garnishee has representational standing to raise defenses that were waived by the judgment debtor where the court's subject matter jurisdiction is not disputed, Murphy asks whether it is proper for a court that lacks subject matter jurisdiction

[1] A respondent is only permitted to rephrase the questions presented if it first demonstrates that there is a misstatement of fact or law that gives rise to an incorrect issue. *See* Sup. Ct. R. 15.2. Murphy has not pointed to any such misstatement that would justify its gratuitous rewriting. *See Eldred v. Ashcroft*, 537 U.S. 186, 232 n.8 (2003) (Stevens, J., dissenting) (noting that "[r]espondent's reformulation of the questions presented by this case confuses [important distinctions].").

to attach property. Murphy suggests that this is not a case of representational standing because it was challenging the court's subject matter jurisdiction – a challenge that can be posed by anyone at anytime. But, no one, including Murphy, ever asserted that the court lacked subject matter jurisdiction under 28 U.S.C. § 1330. Murphy's reformulated question conflates subject matter, *in personam* and *in rem* jurisdiction, and sovereign immunity. They are not the same. Congress made this clear in the FSIA. It is only by blurring the distinctions that Murphy hopes to erase the vibrant circuit split demonstrated in Walker's Petition. Similarly, where the Petition asks whether a foreign state can waive its immunity from attachment, subject only to section 1611, Murphy focuses on only one aspect of the waiver issue, rewriting the question to mask its significance and again avoid the circuit split.

I. THE CIRCUITS ARE SPLIT WITH RESPECT TO REPRESENTATIONAL STANDING

Murphy's opposition hinges on whether section 1610(a) is the source of the court's subject matter jurisdiction to execute on a judgment against a foreign state. If section 1610 is jurisdictional, then it might be raised by anyone at anytime. If section 1610(a) is not the exclusive source of subject matter jurisdiction, then it can be waived and once waived, it is subject to the normal rules of standing. In the latter scenario, the Fifth Circuit's decision creates a clear circuit split.

Section 1610(a) is not jurisdictional. First, the source of any court's subject matter jurisdiction under the FSIA derives from 28 U.S.C. § 1330, which was enacted as part of the FSIA and specifically refers to sections 1605-1607 of the FSIA for subject matter jurisdiction and section 1608 for personal jurisdiction. *See* Pub. L. No. 94-538, 90 Stat. 2891 (Oct. 21, 1976). Congress could not have been clearer in vesting the exclusive source of subject matter jurisdiction in 28 U.S.C. § 1330. Thus section 1604 is aptly entitled "immunity of a foreign state from jurisdiction" and

section 1605 is entitled "general exceptions to the jurisdictional immunity of a foreign state." In contrast, neither section 1609 nor 1610 mentions subject matter jurisdiction or references the term "jurisdiction." Throughout these proceedings, no party has questioned the court's subject matter or personal jurisdiction under 28 U.S.C. § 1330.

Second, Murphy's argument rests on a misunderstanding of the distinctions between subject matter, *in personam*, and *in rem* jurisdiction and sovereign immunity. Murphy suggests that under section 1610, a court can consider whether it has *in rem* jurisdiction *sua sponte*. This argument makes no sense. Garnishment is not an *in rem* proceeding; "it is well-settled that garnishment is an ancillary proceeding 'growing out of, and dependent upon, another original or primary action or proceeding.'" *Smith v. Lorillard, Inc.*, 945 F.2d 745, 746 (4th Cir. 1991), *quoting* 38 C.J.S. Garnishment § 2(a)(4) (1943). Nor was personal jurisdiction at issue since in proceedings both in New York and Texas, the Congo defaulted after having been properly served. The lower courts correctly concluded that they had proper subject matter and *in personam* jurisdiction. The Fifth Circuit did not conclude otherwise. Even if garnishment were *in rem* or *quasi in rem*, the Fifth Circuit expressly recognized that the situs of the property, *i.e.*, Murphy's debt to the Congo, was in Texas and therefore, the court had jurisdiction over the *res*; Murphy does not dispute this decision. Opp. at 7.

In any event, a property owner can waive *in rem* jurisdiction. *See* Fed. R. Civ. P. 12(h); *Porsche Cars North Am. v. Porsche.net*, 302 F.3d 248, 255 (4th Cir. 2002) (noting that *in rem* jurisdiction can be waived); *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 225 n.7 (4th Cir. 2002) (holding that defendants "waived this objection to the district court's *in rem* jurisdiction by failing to raise it"); *United States v. Republic Marine, Inc.*, 829 F.2d 1399, 1401-05 (7th Cir. 1987) (summarizing cases finding *in rem* jurisdiction subject to waiver). Here, the owner of the debt, the Congo, waived any challenge to the

garnishment proceeding. Moreover, as to the Congo, the garnishment proceeding is *in personam*, and the Congo failed to appear. Murphy's assertion that this case turns on *in rem* jurisdictional considerations is inconsistent with the text of the FSIA, its legislative history[2] and the very nature of the garnishment proceeding.

Having failed to demonstrate that section 1610 is jurisdictional, Murphy cannot invoke the FSIA by standing in the shoes of the Congo or in its own right.[3] Murphy declares that representational standing is not implicated here because it "did not bring suit on behalf of itself or anyone else. Rather, it was haled [sic] into court by Petitioner. . . ." Opp. at 13.[4] This Court's standing jurisprudence however draws no distinction between a party's status as a plaintiff or defendant. *See Kowalski v. Tesmer*, No. 03-407 (U.S. 2004) (Thomas, J., concurring); *Campbell v. Louisiana*, 523 U.S. 392 (1998) (assessing whether a criminal defendant had standing to raise certain due process arguments). Standing is "issue dependent"; a party – plaintiff or defendant – may have standing to raise one

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[2] H.R. Rep. 94-1487 at 12-13, 1976 U.S. Code Cong. & Admin. News 6604, 6610-12 (section 1330 provides "a comprehensive jurisdictional scheme in cases involving foreign states. . . . The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 . . . or under any applicable international agreement of the type contemplated by the proposed section 1604."). *See also id.* at 26-27 (stating: "Claimants will clearly benefit . . . from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim in which the foreign state is not entitled to immunity.").

[3] Although Murphy points out that the Fifth Circuit declared Walker's standing argument to be irrelevant, Opp. at 2, the court also found Murphy's claim that it had a duty to raise any known defenses of the Congo irrelevant. Pet. App. at 4a.

[4] Under Murphy's theory, a criminal defendant would never lack standing to raise an issue, because criminal defendants are always in court against their will. This Court has held otherwise. *See Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawling v. Kentucky*, 448 U.S. 98 (1979).

issue, but not another. *See Elk Grove Unified School Dist. v. Newdow*, No. 02-1624 (U.S. June 14, 2004). If a party lacks standing to raise an issue, then by definition, there is no "case or controversy" with respect to that issue and the court lacks Article III jurisdiction to entertain it.

By confusing these jurisdictional concepts, Murphy incorrectly announces that there is no circuit split. To Murphy, the Second, Ninth and Eleventh Circuits' decisions[5] rejecting representational standing under the FSIA are irrelevant because they were addressing section 1605 not section 1610. As the Second Circuit observed, however, "Congress specifically designed the execution immunity rules to 'conform' to the jurisdictional immunity provisions of § 1605." *De Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (citing H.R. Rep. 94-1487).

II. A FOREIGN STATE SHOULD BE ABLE TO WAIVE IMMUNITY FROM EXECUTION EXCEPT AS PROVIDED IN 28 U.S.C. § 1611

The second question presented is whether a foreign state is free to waive its immunity from attachment and execution for its property, subject only to section 1611, *i.e.*, may a foreign state waive the right to invoke section 1609 and thus forego any right under section 1610 to force a judgment creditor seeking to attach property to prove that property is "used for a commercial activity in the United States." Here, the Congo twice waived any defense it might have had to attachment and execution and agreed not to impede enforcement. The Fifth Circuit recognized these waivers and Murphy did not challenge their validity or the Fifth Circuit's findings.

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[5] *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986); *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999).

Nevertheless, the Fifth Circuit held that the FSIA does not permit a foreign state to waive its section 1609 immunity unless the judgment creditor first proves the property is used for commercial activity in the U.S. under section 1610(a). The Fifth Circuit committed two errors. First, it treated the use of property as akin to subject matter jurisdiction, directly conflicting with the Second Circuit's conclusion "that the applicability and effect of section 1609 are not matters, like subject-matter jurisdiction, that may be raised at anytime by a foreign state," and thus, may be waived. *Caribbean Trading v. Nigerian Nat'l Petroleum*, 948 F.2d 111, 115 (2d Cir. 1991) (finding waiver of defenses sections 1609 and 1610).[6] Second, it confused subject matter jurisdiction and immunity, directly conflicting with the language and structure of the FSIA which distinguish subject matter from *in personam* jurisdiction and immunity from execution. Murphy adds to this confusion by failing to address the plain meaning of the FSIA, and dismissing the relevance of the FAA and the New York Convention.

A. Murphy Fails to Address the Plain Meaning of the FSIA

Other than section 1611, the FSIA does not prevent a foreign state from waiving immunity from attachment

[6] Murphy argues instead that the Fifth Circuit's decision is "entirely consistent" with the Second Circuit's treatment of the relationship between 1610 and its enumerated exceptions, quoting *dictum* from an earlier case, *De Letelier*, 748 F.3d 790, as proof that Congress did not intend to reverse the "antipathy to executing against a foreign state's property, even if the end result is 'a right without a remedy.'" Congress's intent, in enacting the FSIA, is directly at odds with this *dictum*. In the FSIA's legislative history, Congress clearly expressed its intention to avoid a right without a remedy by enacting legislation that "would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.R. Rep. 94-1487 at 8, 1976 U.S. Code Cong. & Admin. News 6606.

under section 1609. This is consistent with this Court's holding that rights, whether constitutional or governmental, can be waived. A party, for commercial or other purposes, "may waive any provision [of the Constitution]." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), *quoting Shutte v. Thompson*, 15 Wall. 151, 159 (1873). Correspondingly, a government can waive "a sovereign power through contract." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). *See also Frew v. Hawkins*, 540 U.S. 431 (2004) (a state can waive its Eleventh Amendment rights); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Murphy cites nothing to suggest that Congress intended any different rule to govern the FSIA. Nothing in sections 1609 or 1610 suggests that Congress intended that these provisions be extended greater protection than those in the Constitution. Therefore, sections 1609 and 1610 are subject to the normal rule that permits waiver and Congo waived its immunity here.

By prohibiting a foreign state from waiving attachment immunity with respect to most property, the Fifth Circuit rendered section 1611 superfluous. Section 1611 expressly prohibits a foreign state from waiving attachment immunity with respect to embassy property and military equipment. Murphy argues that the Fifth Circuit's reading is correct because "embassies and military property could be used for a commercial purpose, such as collateral for a loan, and thus could qualify for an exception from immunity under Section 1610(a)." Opp. at 14. Murphy is wrong. Neither military equipment nor embassy property located in the U.S. can be used as collateral for a commercial venture. *See* Foreign Missions Act, 22 U.S.C. §§ 4301 *et seq.* and Arms Export Control Act, 22 U.S.C. §§ 751 *et seq.* (comprehensively regulating ownership interests in and possessory rights to all embassy property and military equipment owned by a foreign government in the U.S.). Section 1611 merely reflects

these limitations on alienation by ensuring that embassy and military property cannot be subject to execution.[7]

B. The Interplay Between the New York Convention, FAA and FSIA Was Not Waived

The Petition challenges the holding that a third party can raise a foreign state's defense of sovereign immunity where the foreign state explicitly waived any immunity. Walker argued that this holding conflicted with treaty obligations and the FAA. Murphy responds by declaring, incorrectly, that these arguments are not fairly included in the questions presented. The question of statutory interpretation certainly is raised in the second question presented concerning whether a court must give effect to a foreign state's broad waiver of immunity. Moreover, whether the FSIA must be read in harmony with the New York Convention and the FAA in fact was raised below, a point that Murphy does not and cannot deny. It is therefore properly before this Court under S. Ct. Rule 14.1(a).

Rule 14.1(a) requires questions presented to be expressed concisely and without unnecessary detail. "The

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[7] Murphy's argument and the Fifth Circuit's ruling also creates the absurd result that under section 1609, a foreign state could not waive immunity for its ordinary commercial properties without proof of commercial use in the U.S., but could waive immunity for the highly sensitive and specially protected central bank accounts held for its own account without such proof. *See* 28 U.S.C. § 1611(b)(1). Congress, however, stated that, in the absence of section 1611(b)(1), "funds used or held in connection with central banking activities" would be treated identically with "funds used solely to finance the commercial transactions of other entities or of foreign states," and that "execution could be levied on such funds without an explicit waiver." Congress sought to avoid this result because if central bank funds were not specially protected beyond the terms of section 1609 or 1610, "deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems." H.R. Rep. 94-1487 at 22.

statement of any question presented is deemed to comprise every subsidiary question fairly included therein," including questions that are "'essential to the analysis' of the question presented, *Procunier v. Naverette*, 434 U.S. 555, 559-560 n.6 (1978), and necessary to 'an intelligent resolution of the constitutionality' of the statute, *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980)." *United States v. IBM Corp.*, 517 U.S. 843, 867-68 (1996) (Kennedy, J., dissenting). *See also Ballard v. Commissioner*, No. 03-184 (March 7, 2005), *citing* R. Stern, *et al.*, SUPREME COURT PRACTICE 414 (8th ed. 2002); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) (even when parties have waived issues below and in their petition, the Court can consider them when they are "so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented.").

In any event, Murphy addresses the issue, but ignores Walker's arguments. It claims Walker did not explain how the FAA conflicts with the Fifth Circuit's interpretation of 28 U.S.C. § 1610(a) other than citing to *Circuit City Stores, Inc v. Adams.*, 532 U.S. 105 (2001). Murphy apparently stopped reading after that citation and thus overlooked the rest of the argument at Petition at 23-25. Murphy ignores that under the FAA, the court was obligated to enforce Congo's waiver of any defense, including defenses under the FSIA. Murphy ignores the Fifth Circuit's failure to harmonize the FAA and New York Convention with the FSIA.

Murphy instead claims that the Fifth Circuit's decision does not conflict with the New York Convention because the Convention does not apply. Opp. at 15, *citing Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), and *Ministry of Defense & Support for the Armed Forces v. Cubic Defense Sys.*, 385 F.3d 1206 (9th Cir. 2004). Neither *Victrix* nor *Ministry of Defense* endorse the rejection of the Convention here. The assets in *Victrix* were already under the jurisdiction of a foreign state's bankruptcy court. The arbitral award there was obtained

after the parties already had submitted to the bankruptcy court's jurisdiction. The Second Circuit properly deferred to the bankruptcy court under the federal Bankruptcy Act. In *Ministry of Defense*, the plaintiff argued that there was a conflict between the Victims' Protection Act and the Convention. The Second Circuit did not find that the Convention was irrelevant; it found that the Convention had been fully enforced in that case, but was not relevant to whether a third party could attach the judgment at issue. That is not the question here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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